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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

FROM THE FOURTH COURT OF APPEALS

SAN ANTONIO, TEXAS

No. 04-16-00188-CR

Petitioner PABLO ALFARO-JIMENEZ (Appellant)

v.

STATE OF TEXAS
Respondent (Appellee)

From the 186TH District Court, Bexar County Texas
HONORABLE JEFFERSON MOORE, JUDGE PRESIDING
Cause No. 2014-CR-9248

SECOND AMENDED PETITION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT REQUESTED

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a) (20), the parties to this suit are as follows:

(1) **PABLO ALFARO-JIMENEZ**, is the Appellant/Petitioner and was the defendant in the trial court.

(2) The **STATE OF TEXAS**, by and through the Bexar County District Attorney's Office, Paul Elizondo Tower, 101 W. Nueva ST., 4th floor, San Antonio, Texas 78205, is the Appellee and prosecuted this case in the trial court.

The trial attorneys were as follows:

(1) APPELLANT was represented by **ANTHONY J. COLTON,** SBN 24064564**,** 2205 Veterans Blvd, Suite A2, Del Rio, Texas 78840, at trial and on appeal.

(2) The State of Texas was represented by **NICOLAS A. LAHOOD,** District Attorney, Paul Elizondo Tower, 101 W. Nueva ST., 4th floor, San Antonio, Texas 78205. The appellate attorneys are as follows:

(1) **PABLO ALFARO-JIMENEZ** is represented by **ANGELA J. MOORE,** SBN #14320110, Tower Life Building, 310

S. St. Mary's Street, Suite 1910, San Antonio, Texas 78205, on the Petition for Discretionary Review.

(2) **NICOLAS A. LAHOOD**, District Attorney, and the District Attorney's Office, Appellate Division, San Antonio, Texas 78205, represent the State of Texas.

The trial judge was **Hon. JEFFERSON MOORE**, 186th District Court, 300 Dolorosa St., 3rd Floor, San Antonio, Texas 78205.

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To the Honorable Court of Criminal Appeals:

Now comes Angela J. Moore, and files this Petition for Discretionary Review on behalf of Petitioner PABLO ALFARO-JIMENEZ.

STATEMENT OF THE CASE

On December 9, 2015, Appellant, PABLO ALFARO-JIMENEZ, was indicted for

Count I

Paragraph I

on or about the 10th Day of July, 2014, PABLO ALFARO-JIMENEZ did, with intent to defraud and harm another, namely: Social Security Administration and Officer Edward Rodriguez, make, present or use a governmental record, to-wit: a Social Security Card containing a number not assigned to the defendant, by presenting said government record to Officer Edward Rodriguez for identification, and the defendant made, presented or used the governmental record with knowledge of its falsity;

Paragraph II

on or about the 10th Day of July, 2014, PABLO ALFARO-JIMENEZ did, with intent to defraud and harm another, namely: Social Security Administration, possess a GOVERNMENTAL RECORD, to-wit: a Social Security Card containing a number not assigned to the defendant, with INTENT THAT IT BE USED

(unlawfully) (1 CR 4). Petitioner was found guilty by a jury of tampering with a government document-a Class A misdemeanor. The judge subsequently assessed punishment at one (1) year confinement in the Bexar County Adult Detention Center, however, the court suspended the sentence and placed Petitioner on community supervision for a period of two (2) years.

PROCEDURAL HISTORY OF THE CASE

The Appeal was timely filed. On August 2, 2017, the lower court issued an opinion in the above styled cause of action affirming the trial court's judgment in its entirety. The State filed a motion for rehearing. The State's motion for rehearing was granted. The court's opinion and judgment dated August 2, 2017 were withdrawn and this current opinion and judgment were substituted in their stead. *Alfaro-Jimenez v. State*, 04-16-00188-CR, 2017 WL 5471896, at *1 (Tex. App.—San Antonio Nov. 15, 2017, no pet. h.).

In the substitute opinion, the Court of Appeals overruled Petitioner's complaints on appeal. The Court of Appeals reformed the judgment convicting Petitioner of a more serious offense and reversed and remanded the case for a new sentencing within the third-degree FELONY range. *Alfaro-Jimenez v. State*, 04-16-00188-CR, 2017 WL 5471896.

STATEMENT REGARDING ORAL ARGUMENT

The instant case presents a unique distortion of the authority of an appellate court to reform a judgment and remand the cause back to the trial court for a new sentence. In no stretch of the imagination of any reasonable attorney or member of the bench is there any existence of authority for an appellate court to reform a conviction to a *higher offense*, never true billed

or, passed upon by the grand jury, presented to the fact-finding jury or ruled on by petit jury as fact finder. And, the higher offense was not even part of the petit jury's determination and resolution. The jury charge and verdict clearly match the judgment and reflects the conviction of the lesser included offense (CR 4, indictment) and not the greater. (CR-37). Indeed, the jury note asking for clarification, "what does presenting mean?" (CR-25) show the jury did not find that element and opted for the lower offense. It is for these reasons oral argument is necessary to correct and prevent this abuse of power and lack of authority.

GROUNDS FOR REVIEW

1. WHETHER THE COURT OF APPEALS MISAPPLIED THE LAW TO THE EVIDENCE IN THIS CASE, WHICH IS INSUFFICIENT TO FIND PETITIONER GUILTY AS ALLEGED IN THE INDICTMENT OF TAMPERING WITH A GOVERNMENT DOCUMENT. PETITIONER DID NOT "PRESENT" THE SOCIAL SECURITY CARD, AN ELEMENT STATUTORILY PRESCRIBED, AND MERE POSSESSION OF THE CARD IS NOT TAMPERING WITH A GOVERNMENT DOCUMENT.

2. WHETHER THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW INSTEAD OF APPLYING THE CORRECT STANDARD OF *CLEAR AND CONVINCING* EVIDENCE AS REQUIRED BY TEXAS LAW.

3. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE ENCOUNTER WAS MERE CONSENSUAL CONTACT BETWEEN PETITIONER AND THE POLICE, AND THE REMOVAL OF HIS WALLET, WHILE HANDCUFFED, WAS A CONSENSUAL PRESENTATION OF IDENTIFICATION, SINCE APPLYING THE LAW TO THESE FACTS, THE COURT MISCONSTRUES THE CONCEPT OF POLICE CITIZEN ENCOUNTERS AND MANGLES A SIGNIFICANT PROPOSITION OF SEARCH AND SEIZURE LAW IN TEXAS.

4. WHETHER THE RIGHT TO A JURY TRIAL MANDATED BY U.S. CONST. SIXTH AND FOURTEENTH AMENDMENTS, AND U.S. CONST. ART. III § 2, AND THE CONCEPTS SET OUT BY THIS COURT IN *APPRENDI* AND *BLAKELY*, IS VIOLATED BY THE PROCEDURE UTILIZED BY THE COURT OF APPEALS, THAT IS, A JUDICIAL FINDING OF AN ELEMENT NOT ALLEGED IN THE INDICTMENT OR SUBMITTED TO THE JURY, WHICH IS AN UNACCEPTABLE DEPARTURE FROM THE JURY TRADITION, AN INDISPENSABLE PART OF OUR CRIMINAL JUSTICE SYSTEM, BY MAKING APPELLATE COURTS FACT FINDERS AS TO AN ELEMENT NOT CONSIDERED BY THE JURY?

5. WHETHER THE RIGHT TO A JURY TRIAL AND DUE PROCESS REQUIRED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND *JACKSON V. VIRGINIA*, 443 U.S. 307, 99 S.CT. 2781, 61 L.ED.2D 560 (1979), WAS VIOLATED WHEN THE COURT OF APPEALS REFORMED THE PETITIONER'S CONVICTION TO THE CONVICTION OF A HIGHER OFFENSE, WHEN SUCH HIGHER OFFENSE WAS NOT DETERMINED BY THE JURY, THE FACTFINDER RESULTING IN A REFORMED VERDICT WHICH WAS NOT RENDERED BY THE JURY OR THE TRIAL COURT?

STATEMENT OF FACTS

On or about July 10, 2014, the San Antonio Police Department was dispatched for a domestic disturbance. Upon arrival, the officers spoke to the complaining witness, Zoraida Rodriguez, and confirmed that she had not been injured and that Mr. Alfaro-Jimenez had left the premises. Before the officers left the area, Mr. Alfaro-Jimenez approached the officers asking to be able to give his side of the story. The officers immediately placed Mr. Alfaro-Jimenez in handcuffs and began accusing him of mistreating Ms. Rodriguez. Officer Rodriguez asked Mr. Alfaro-Jimenez his name to which he gave the same name that Ms. Rodriguez had given to the officers, although, as it turned out, this was a fictitious name.

The officer then asked Mr. Alfaro-Jimenez for his identification. Mr. Alfaro-Jimenez was in handcuffs and, therefore, could not give the officer his identification as it was in his wallet in his pocket. The officer proceeded to remove Mr. Alfaro-Jimenez's wallet without his consent and began going through the wallet. Even after finding Mr. Alfaro-Jimenez's identification which matched the name that both he and Ms. Rodriguez had given to the officers, Officer Rodriguez continued to peruse the other documents in the wallet. At some point during this search, Officer Rodriguez decided that a social security card in the wallet looked fake and, while continuing to detain

Mr. Alfaro-Jimenez in handcuffs, proceeded to attempt to contact ICE officials to investigate the authenticity of the social security card. After a prolonged detention for the officer to contact ICE, Mr. Alfaro-Jimenez was arrested for tampering with a government record.

SUMMARY OF THE ARGUMENT

The officers exceeded their authority by prolonging the detention of Mr. Alfaro-Jimenez beyond the scope of their investigation into an alleged domestic disturbance. The officers had confirmed that Ms. Rodriguez had not been injured and that no property had been damaged. The officers had no reason to believe that Mr. Alfaro-Jimenez had broken any laws and, therefore, continuing to detain Mr. Alfaro-Jimenez was in violation of his rights. Jimenez's wallet from his pocket constituted an illegal search and seizure and, therefore, required suppression of the evidence. The officers illegally searched Mr. Alfaro-Jimenez without his consent or reasonable suspicion of a crime being committed. The officers had no reasonable suspicion that Mr. Alfaro-Jimenez was lying about his identity, had no consent to search Mr. Alfaro-Jimenez, and, therefore, the subsequent removal of Mr. Alfaro-Jimenez. The evidence was insufficient to show that Mr. Alfaro-Jimenez *presented* the social security card to the officer as required by the statue. Mr. Alfaro-Jimenez was in handcuffs when the officer

pulled his wallet from his pocket and searched through the wallet. Even after finding Mr. Alfaro-Jimenez's identification, the officer continued to search through the wallet until he found the fake social security card. Mr. Alfaro-Jimenez made no attempt to use the card and no evidence at the trial would support any type of presentment.

The Fourth Court of Appeals had no authority or jurisdiction to resolve fact differences and find Petitioner guilty of a higher offense and reforming the judgment as such. The Court then brazenly remanded the case to the trial court for punishment within a higher penalty range. The Court of Appeals cited no authority for the proposition that the Court COULD do this reformation, but rather cited to case law regarding fact comparisons. The reformation by the Court of Appeals is void and the remand for resentencing is also without authority and thus a jurisdictional flaw.

ARGUMENT AND AUTHORITIES

FOR GROUNDS ONE, TWO, AND THREE RESTATED

1. WHETHER THE COURT OF APPEALS MISAPPLIED THE LAW TO THE EVIDENCE IN THIS CASE, WHICH IS INSUFFICIENT TO FIND PETITIONER GUILTY AS ALLEGED IN THE INDICTMENT OF TAMPERING WITH A GOVERNMENT DOCUMENT. PETITIONER DID NOT "PRESENT" THE SOCIAL SECURITY CARD, AN ELEMENT STATUTORILY PRESCRIBED, AND MERE POSSESSION OF THE CARD IS NOT TAMPERING WITH A GOVERNMENT DOCUMENT.

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3. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE ENCOUNTER WAS MERE CONSENSUAL CONTACT BETWEEN PETITIONER AND THE POLICE, AND THE REMOVAL OF HIS WALLET, WHILE HANDCUFFED, WAS A CONSENSUAL PRESENTATION OF IDENTIFICATION, SINCE APPLYING THE LAW TO THESE FACTS, THE COURT MISCONSTRUES THE CONCEPT OF POLICE CITIZEN ENCOUNTERS AND MANGLES A SIGNIFICANT PROPOSITION OF SEARCH AND SEIZURE LAW IN TEXAS.

Motion to Suppress illegal search and arrest

Petitioner was illegally detained. The Court of Appeals missed the proverbial boat. The instant case did not involve a search incident to a lawful arrest which requires no warrant if it is restricted to a search of the person or of objects immediately associated with the person of the arrestee. *See United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). In *Stewart*, the Court upheld the warrantless search of the defendant's purse as a search incident to a lawful arrest. However, here Petitioner was not under arrest, as argued by the State. *Snyder v. State*, 629 S.W.2d 930, 934 (Tex. Crim. App. 1982). This case involved a "seizure" of the Petitioner's body, and a search of his wallet which was removed from his pocket by the officer. At that time, the officer had no reason to doubt Petitioner's name was not as stated and as given by the complainant. Rather, it was only the police's suspicion that Petitioner "might be illegal."

There can be absolutely no valid consent when one is cuffed by officers immediately approaching his own home. Even if this Court finds there was no detention, this Court must also consider whether Petitioner's "consent" was an independent act of free will. In doing so, the court must consider (1) the temporal proximity of the illegal detention and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial misconduct. *United State v. Portillo–Aguirre,* 311 F.3d 647, 659 (5th Cir.2002); *Pineda v. State,* 444 S.W.3d 136, 144 (Tex. App.—San Antonio 2014, pet. ref'd). With regard to the first factor, the record reflects that Petitioner allegedly "gave his consent" after he was cuffed, the officer reached in Petitioner's pocket and then opened the wallet. The Court of Appeals failed in disregarding a proper analysis.

There are no facts to support the police search by reaching into Petitioner's pocket. With regard to the second factor, the record does not reveal any intervening circumstances that might have lessened the taint of the unlawful detention. With regard to the third factor, the record reflects that the officers' conduct was flagrant and that his purpose was to commit an illegal detention, that is as detention based on a racist point of review that Petitioner might be illegal, which had no relationship to the possible threat to the complainant. *Cf. Portillo–Aguirre,* 311 F.3d at 659 (explaining that the

officer routinely made extended detentions to "detect evidence of ordinary criminal wrongdoing" without reasonable suspicion). Considering all three factors, it is clear that Petitioner's "consent" to search his person did not dissipate the taint of the officer's violation under the Fourth Amendment because his consent was not an independent act of his free will. *See Pineda,* 444 S.W.3d at 144. Therefore, the trial court should have granted Petitioner's motion to suppress. The Court of Appeals erred in holding that the suppression was proper. The State and the Court of Appeals found there was no arrest, the seizure and search of the wallet cannot be upheld as "incident to an arrest."

The wallet had no relationship to the offense reported. Jimenez's identification was not needed since Petitioner identified himself as the assailant and with the same name as reported by the complainant. The identification of Jimenez was thus irrelevant to whether he was a danger to the officers. Petitioner's identification was only due to the suspicion that he might be illegal. Such a search and seizure was completely unnecessary to officer safety.

Because Petitioner's constitutional rights were violated, the Court must reverse the trial court's judgment of conviction or punishment *unless* it can be determined beyond a reasonable doubt that the trial court's error did not

contribute to Petitioner's conviction or punishment. *See* TEX.R.APP. P. 44.2(a). In this case, the trial court's denial was harmful because it "undoubtedly contributed to Petitioner's conviction" because the coercion and seizure of Petitioner's wallet were the genesis of this conviction. See *Pineda,* 444 S.W.3d at 144 (quoting *Castleberry v. State,* 100 S.W.3d 400, 404 (Tex.App.—San Antonio 2002, no pet.)).

The Court of Appeals Decision

Although the Court of Appeals used the cut and paste language as normally used in that court's review of a trial court's denial of a motion to suppress, the Court did not apply the correct standard, and misapplied the facts. Indeed, the Court basically ignored the facts in the construct of the correct standard. The validity of an alleged consent to search is a question of fact to be determined from all the circumstances. *Ohio v. Robinette,* 519 U.S. 33, 40 (1996); *Maxwell v. State,* 73 S.W.3d 278, 281 (Tex.Crim.App.2002). It is important to point out that the Court of Appeals ignored proper review of consent under the federal constitution which requires the State to prove the validity of the consent by a *preponderance of the evidence,* while the Texas Constitution requires the State to show by *clear and convincing* evidence that the consent was valid. *Maxwell,* 73 S.W.3d at 281.

No reasonable suspicion existed

A warrantless detention that amounts to less than a full-blown custodial arrest must be justified by a reasonable suspicion. *Ford v. State,* 158 S.W.3d 488, 492 (Tex.Crim.App.2005). An officer conducts a lawful temporary detention when he has *reasonable suspicion* to believe that an individual is violating the law. *Id.* Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity. *Id.* This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists. *Id.* Here, the officers were called for a domestic disturbance. The officers were reassured by Ms. Rodriguez, that in fact, she had not been injured and Mr. Alfaro-Jimenez had left the premises. Officer Rodriguez knew those facts. As a result, the officer's presence was no longer needed, and any danger or exigent circumstances had already ended when Petitioner returned to his home. From the account from Ms. Rodriguez, Mr. Alfaro-Jimenez had yelled and banged on the door and windows but had not caused damage and had left once Ms. Rodriguez said she was calling the police. The

officer admitted in the hearing that the dispatch did not say there was violence or any weapons. (3 RR 10).

When Mr. Alfaro-Jimenez approached the officers, they stated no articulable reason as to why they would fear for their safety, however, they chose to put Mr. Alfaro-Jimenez in handcuffs immediately only citing "officer safety" and patting him down finding no weapons. (3 RR 30). Only after handcuffing Petitioner did the officer request Petitioner's name. Mr. Alfaro-Jimenez gave the officer the same name that Ms. Rodriguez had given them, and the *officer even admitted at the hearing that he had no reason to believe the name was not correct*. (3 RR 13).

Additionally, the officer knew the complainant stated Petitioner was banging on the windows and kicking the door, not assaulting her. (3 RR 10). The officer also admitted there was "nothing broken" and there was nothing going on at the house." (3 RR 15). He admitted the Petitioner approached them politely and calmly and only stated he wished to discuss his side of the events with the officers. (3 RR 12). The officers were leaving in fact, and Petitioner's arrival was 30 minutes after the officers arrived. (3 RR 19). There is an absence of evidence that Appellant did not reside at the home. The officer admitted his training on spotting false documents occurred 13 years

ago at the academy and he has not received any formal training since then. (3 RR 26).

Once cuffed, Officer Rodriguez asked for Mr. Alfaro-Jimenez to produce an identification. (3 RR 13). However, being that Mr. Alfaro-Jimenez is in handcuffs and obviously unable to comply, the officer proceeded to illegally search Mr. Alfaro-Jimenez by reaching into his pocket and pulling his wallet out. (3 RR 14). Even after confirming that the name given to the officers matched the identification in the wallet, the officer continued to detain Mr. Alfaro-Jimenez and continued searching through his wallet. (3 RR 14). The video in this case clearly confirms the immediate arrest of Petitioner solely because he approached the officers, although he did so calmly and politely. Petitioner moved for suppression of the evidence illegally obtained, based on the prolonged detention, the illegal search, and illegal arrest. The trial court erroneously found consent for the search and probable cause for the arrest. (3 RR 32).

The Court of Appeals erred in accepting the "officer safety" argument by finding Petitioner's cuffing was appropriate. It is impossible by any stretch of the imagination that the State proved that fact by *clear and convincing evidence (rather than by a preponderance of the evidence)*. Instead, the officer admitted he had "experience in spotting false documents," (although

a mere patrol officer,) and also admitted that his suspicion was that Petitioner was illegal, *was the basis of removing* Petitioner's wallet to look at its contents so he could "determine who he was dealing with." (3 RR 13). This testimony clearly shows an absence of reasonable suspicion to support manufactured belief for "officer safety" when the officer's testimony completely contradicted the ruse.

GROUND FOR REVIEW NUMBERS FOUR AND FIVE RESTATED

4. WHETHER THE RIGHT TO A JURY TRIAL MANDATED BY U.S. CONST. SIXTH AND FOURTEENTH AMENDMENTS, AND U.S. CONST. ART. III § 2, AND THE CONCEPTS SET OUT BY THIS COURT IN *APPRENDI* AND *BLAKELY*, IS VIOLATED BY THE PROCEDURE UTILIZED BY THE COURT OF APPEALS, THAT IS, A JUDICIAL FINDING OF AN ELEMENT NOT ALLEGED IN THE INDICTMENT OR SUBMITTED TO THE JURY, WHICH IS AN UNACCEPTABLE DEPARTURE FROM THE JURY TRADITION, AN INDISPENSABLE PART OF OUR CRIMINAL JUSTICE SYSTEM, BY MAKING APPELLATE COURTS FACT FINDERS AS TO AN ELEMENT NOT CONSIDERED BY THE JURY?

5. WHETHER THE RIGHT TO A JURY TRIAL AND DUE PROCESS REQUIRED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND *JACKSON V. VIRGINIA*, 443 U.S. 307, 560 (1979), WAS VIOLATED WHEN THE COURT OF APPEALS REFORMED THE PETITIONER'S CONVICTION TO THE CONVICTION OF A HIGHER OFFENSE, WHEN SUCH HIGHER OFFENSE WAS NOT DETERMINED BY THE JURY, THE FACTFINDER RESULTING IN A REFORMED VERDICT WHICH WAS NOT RENDERED BY THE JURY OR THE TRIAL COURT?

The Statute and the court's reformation of the judgment and sentence

On State's motion for rehearing the Court reversed the conviction and punishment. [1]The Court of Appeals reformed the judgment to a higher

[1] The rules of appellate procedure provide that, after an earlier motion for rehearing is decided, a further motion for rehearing may be filed within 15 days if the Court modifies its judgment, vacates its judgment and renders a new one, or issues an opinion in

offense than found by the jury. The remand for resentencing within a higher penalty range of a third-degree felony, is erroneous. The Court found that since the State sought to charge Petitioner with a second-degree felony of tampering with a government record, the State had to prove that additionally, that the accused committed the offense "with the intent to defraud or harm another." *See* TEX. PENAL CODE ANN. §§ 37.10(c)(1). The Court of Appeals then reviewed the evidence, explaining that at trial the testimony focused on Alfaro-Jimenez's possession and use of the social security card as identification. But the Court went on to discuss Alfaro-Jimenez's testimony, that he did not obtain any additional benefits or use the card for any purpose other than employment. The Court then concluded *the jury could have reasonably concluded that during the commission of the offense, Alfaro-Jimenez used or presented the social security card, but that he did not intend "to defraud or harm another." Tottenham v. State*, 285 S.W.3d 19, 28 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd)

overruling a motion for rehearing. TEX.R.APP.P.49.5. While Appellant had an opportunity to file another rehearing or respond to the motion for rehearing initially, (Rule 49.2). Appellant declined to do so because it would have been an exercise in futility. It is important to note that The Court of Appeals withdrew its initial opinion, and filed its superseding opinion reversing the verdict and punishment. Petitioner argues that this act is incorrect. The second opinion must be read as an amendment of the first opinion, since both opinions must be considered to review and understand the Court's actual reasoning and holding.

The court did not stop there. The Court decided bizarrely "*However, **because the testimony clearly supported the social security card was a certificate, see Lopez, 25 S.W.3d at 929, we conclude the trial court erred in sentencing Alfaro-Jimenez's offense as a Class A misdemeanor, see Tex. Penal Code Ann. § 37.10(c)(2)(A) (providing the offense is a third-degree felony if the government record is "... a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States, unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the second degree*** [.]") (emphasis added). *Alfaro-Jimenez v. State*, 04-16-00188-CR, 2017 WL 5471896, at *9 (Tex. App.—San Antonio Nov. 15, 2017, no pet. h.) The statute found in section 37.10 of the Texas Penal Code, presents two main questions: First, is a fake social security card a government document that can be tampered with; and secondly, based on the facts in this case, did Mr. Alfaro-Jimenez consensually "present" the social security card to the officer as required by the statute? There <u>was no evidence</u> at trial that the social security card found in Mr. Alfaro-Jimenez's wallet <u>was, in fact, a *social security card* at all</u>. The only evidence at trial was that the number on the card did not match the name on the card. There was

no evidence presented as to where the card originated other than Mr. Alfaro-Jimenez's testimony that it did not come from the social security office. (4 RR 14). The direct text of Texas Penal Code § 37.10, which is the basis of this prosecution, is less than clear.

First, there are six different ways to commit the offense.

1) Make a false entry in, or false alteration of, a governmental record.

2) Make, present, or use any record, document, or thing with knowledge of its falsity.

3) Intentionally destroy, conceal, remove, or otherwise impair the verity, legibility, or availability of a governmental record.

4) Possess, sell, or offer to sell a governmental record or a blank governmental record.

5) *Make, present, or use* a governmental record with knowledge of its falsity.

6) Possess, sell, or offer to sell a governmental record or form with knowledge that it was obtained unlawfully.

7). The Jury Charge in this case states that, "A person commits an offense if the person makes, presents, or uses a governmental record with knowledge of its falsity or possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully." (CR 29). The jury charge further defined a governmental record as anything belonging to, received by, or kept by government for information, including a court record, anything required by law to be kept.

8) There is absolutely *no evidence* that Appellant made, presented, or used the fake social security card, and any display of the card was due to the officer's illegal seizure. Petitioner's admission that he used the card only for employment was heard by the jury and resolved in his favor.

At the most, if the Court can swallow the jagged pill that Appellant consented to the officers' search of his person and wallet, the Court can surmise that the officer pulled out Appellant's wallet for the purpose of retrieving his identification. In no way could that be construed as making, presenting, or using a governmental record, much less a "certificate." During the trial, the prosecution waffled back and forth under which part of the statute they were proceeding and even the Court engaged in a guessing game as to which part of the statute would apply. (3 RR 103). The general consensus, as shown by the jury charge was to proceed under sections (a)(2) and/or (a)(4). Make, present, or use under section (a)(2) is not defined in that section. Even the jury was unclear as to what "Presenting" meant as they requested that the Court provide them with a definition, however, the Court declined to do so. (CR- 25).

Section (a)(4) is unclear as it fails to delineate whether the possession has to do with selling the governmental document or if mere possession is contemplated. In Appellant's position, it would have been impossible for him to know whether or not the fake social security card he possessed was a violation of this particular statute. Nowhere in the statute does it identify a social security card, or even an identification card, as a governmental record.

Thus, the statute is patently unclear and allowed Petitioner's conviction without evidence that meets the statute's basic elements.

Lastly, the Court of Appeals *sua sponte (based on the State's motion for rehearing)* found that Petitioner committed a higher offense, section 37.10 2 (C) a license, *certificate,* permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States; TEXAS PENAL CODE § 37.01 (West). This offense was not indicted, charged to the jury, nor was the offense submitted to the jury for a finding of guilt or innocence. Nowhere in the indictment is the "certificate" offense mentioned.

Texas jurisprudence is replete with case law requiring a reformation DOWN to a lesser included offense in a sufficiency of the evidence review. If an appellate court finds "the evidence insufficient to support an appellant's conviction for a greater-inclusive offense," the court must consider the following two questions when "deciding whether to reform the judgment to reflect a conviction for a *lesser-included offense*":

"1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction

for that offense?" *Thornton*, 425 S.W.3d at 299-300; *see also Rabb*, 483 S.W.3d at 21 (applying *Thornton* to bench trial). "If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment." *Thornton*, 425 S.W.3d at 300. "But if the answers to both are yes, the court is authorized—indeed required—to avoid the 'unjust' result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense." *Id. Martinez v. State*, 524 S.W.3d 344, 348 (Tex. App.—San Antonio 2017, pet. ref'd).

However, case law does not permit an appellate court to reform the conviction for a different offense, which is a higher degree offense, and remanding for a higher sentencing range. Indeed, such an action is the appellate court acting as grand jury, prosecution and fact-finding jury. The reviewing court may not, under the guise of reforming a sentence, which is actually to pronounce sentence. *Harvey v. State,* 150 Tex. Crim. 332, 201 S.W.2d 42 (1947). For example, where an appellant was charged with and the jury convicted him of the offense of possession of less than 28 grams of cocaine, but the court's judgment stated that the appellant was convicted of possession of "at least 28 grams of cocaine," the appellate court agreed with the appellant and the state that the judgment should be reformed to reflect that the appellant was convicted of possession of less than 28 grams of

cocaine. *Hardin v. State,* 951 S.W.2d 208 (Tex. App.-Houston 14th Dist. 1997).

CONCLUSION AND PRAYER

Petitioner requests that this Honorable Court hold the social security card was illegally seized, was never displayed or used to the officers and there is no evidence that the card was ever used with the intent to harm or defraud. Indeed, there is no testimony that the card seized from Petitioner was a false Social Security card. The case must result in an acquittal. Petitioner requests that this case be reversed and rendered. The courts of appeals and the court of criminal appeals may reverse the trial court's judgment and remand the case for further proceedings. TEX. R. APP. P. 78.1(d) (Court of Criminal Appeals-CCA). When reversing the court of appeals' judgment, the CCA may, in the interests of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate. TEX. R. APP. P. 78.2. Petitioner requests such a remand as an alternative to an acquittal, if necessary, without the illegally seized evidence.

WHEREFORE, PRESMISES CONSIDERED, the Appellant submits that the judgment of the trial court should, in all things, be REVERSED and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Angela J. Moore, Attorney for Petitioner, hereby certifies that a true and correct copy of the above and forgoing brief was served via e-filing to the Bexar County District Attorney's Office on or about February 24, 2018.

/s/ Angela J. Moore
ANGELA J. MOORE

CERTIFICATE OF COMPLIANCE

I, Angela J. Moore, Attorney for Petitioner, hereby certifies that this Petition for Discretionary Review, is within the 4500-word limitation described in Rule 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure having a total of 4,256 computer generated words excluding the portions specifically excepted by the above cited rule.

/s/ Angela J. Moore
ANGELA J. MOORE

APPENDIX A

COURT OF APPEALS OPINION IN JIMENEZ V. STATE, FROM THE FOURTH COURT OF APPEALS SAN ANTONIO, TEXAS, DATED

August 2, 2017
No. 04-16-00188-CR

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-16-00188-CR

Pablo **ALFARO-JIMENEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR9248
Honorable Jefferson Moore, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: August 2, 2017

AFFIRMED

On December 9, 2015, a Bexar County jury returned a guilty verdict against Appellant Pablo Alfaro-Jimenez on one misdemeanor count of tampering with a government document, a Social Security card. The trial court subsequently sentenced Alfaro-Jimenez to one-year confinement in the Bexar County Jail, suspended and probated for a period of two years, and a $1,500.00 fine. On appeal, Alfaro-Jimenez contends: (1) the evidence is insufficient to support the jury's verdict; (2) the trial court erred denying Alfaro-Jimenez's motion to suppress; and (3)

Texas Penal Code section 37.10, the statute under which Alfaro-Jimenez was convicted, is unconstitutionally vague. *See* TEX. PENAL CODE ANN. § 37.10 (West 2016).

FACTUAL AND PROCEDURAL BACKGROUND

On July 10, 2014, San Antonio Police Officer Edward Rodriguez was dispatched for a domestic disturbance. The complainant told the officers that her ex-boyfriend, identified as Juan Alberto Torres Landa, was beating on the door, kicking the door, and threatening her. By the time officers arrived, the ex-boyfriend was gone.

After conducting an investigation, and ensuring the complainant's safety, Officer Rodriguez was leaving the premises when the ex-boyfriend approached Officer Rodriguez and requested permission to tell his version of the incident. In light of the violent allegations, the individual was handcuffed for officer safety. While attempting to identify the ex-boyfriend, Officer Rodriguez became suspicious that the ex-boyfriend's identification, specifically the Social Security card, was fraudulent.

Officer Rodriguez contacted Immigration and Customs Enforcement (ICE) and determined the name and information provided did not belong to the ex-boyfriend. The individual subsequently identified himself as Pablo Alfaro-Jimenez and Officer Rodriguez confirmed the identification through a fingerprint comparison. Appellant Alfaro-Jimenez was arrested for tampering with a government document.

A jury returned a guilty verdict against Alfaro-Jimenez and the trial court subsequently assessed punishment at one-year confinement in the Bexar County Jail, suspended and probated for a period of two years, and a $1,500.00 fine. This appeal ensued.

MOTION TO SUPPRESS

Prior to opening statement, and outside the presence of the jury, the trial court heard testimony and arguments pertaining to Alfaro-Jimenez's motion to suppress. Asserting the officers

possessed insufficient grounds to arrest Alfaro-Jimenez, and that the search extended beyond reasonable grounds, defense counsel sought to suppress both the evidence and Alfaro-Jimenez's statements.

A. Standard of Review

An appellate court reviews a trial court's ruling on a motion to suppress using a bifurcated standard of review; we "'afford almost total deference to a trial court's determination of the historical facts that the record supports.'" *Montanez v. State*, 195 S.W.3d 101, 106 (Tex. Crim. App. 2006) (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)); *accord Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). A reviewing court must

> give almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. But when application-of-law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court's rulings on those questions de novo.

Wilson v. State, 442 S.W.3d 779, 783 (Tex. App.—Fort Worth 2014, pet. ref'd) (citations omitted); *see also Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); *Swearingen v. State*, 143 S.W.3d 808, 811 (Tex. Crim. App. 2004).

B. Arguments of the Parties

Alfaro-Jimenez contends Officer Rodriguez exceeded his authority by prolonging the detention beyond the scope of his investigation and that he conducted an illegal search when he retrieved Alfaro-Jimenez's wallet without his consent.

The State counters that, based on a totality of the circumstances, Officer Rodriguez's actions constituted a reasonable investigative detention and, that during such detention, Alfaro-Jimenez provided Officer Rodriguez consent to procure Alfaro-Jimenez's identification from the wallet located in his back pocket.

C. Interactions between Police Officers and Citizens

"The Fourth Amendment protects individuals against unreasonable searches and seizures." *State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011) (citing U.S. CONST. amend. IV). Importantly, however, the Fourth Amendment is not invoked simply because an officer and a person converse. *See Weaver*, 349 S.W.3d at 525. Our analysis, therefore, begins with a determination of whether Alfaro-Jimenez met his initial burden to produce some evidence that the police conducted a search or seizure without a warrant. *See Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Only after some evidence has been presented does the burden shift to the State to establish that the warrantless search was reasonable. *Id.*

The Texas Court of Criminal Appeals addressed the interactions between officers and private citizens in *State v. Garcia-Cantu*; the court stated that "[e]ach citizen-police encounter must be factually evaluated on its own terms; there are no per se rules." *State v. Garcia–Cantu*, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008). "[T]here are three distinct types of interactions between police and citizens: (1) consensual encounters, which require no objective justification; (2) investigative detentions, which require reasonable suspicion; and (3) arrests, which require probable cause." *State v. Castleberry*, 332 S.W.3d 460, 466 (Tex. Crim. App. 2011) (footnotes omitted); *accord Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010). "In assessing whether a seizure is an investigative detention or an arrest, we take an objective view of the officer's actions—'judged from the perspective of a reasonable officer at the scene, rather than with the advantage of hindsight.'" *State v. Adams*, 454 S.W.3d 38, 44 (Tex. App.—San Antonio 2014, no pet.) (quoting *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997)). Handcuffing alone does not necessarily transform an investigative detention into an arrest. *See State v. Sheppard*, 271 S.W.3d 281, 283 (Tex. Crim. App. 2008) ("[A] person who has been handcuffed has been 'seized' and detained under the Fourth Amendment, but he has not necessarily been 'arrested.'"); *see also*

Rhodes, 945 S.W.2d at 118 (concluding there is no bright-line test providing that mere handcuffing is always equivalent of arrest). "[A]llowances must be made for the fact that officers must often make quick decisions under tense, uncertain and rapidly changing circumstances." *Rhodes*, 945 S.W.2d at 118; *accord Hauer v. State*, 466 S.W.3d 886, 891 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

To establish reasonable suspicion, "an officer must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" *Foster v. State*, 326 S.W.3d 609, 613 (Tex. Crim. App. 2010) (quoting *United States v. Sokolow*, 490 U.S. 1, 21 (1989)). The determination must be based on common-sense judgments and rational inferences about human behavior. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *see also Young v. State*, 133 S.W.3d 839, 841 (Tex. App.—El Paso 2004, no pet.). Police officers may rely on their own experience and training when making this determination. *Young*, 133 S.W.3d at 841. "The issue is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *Kothe v. State*, 152 S.W.3d 54, 64–65 (Tex. Crim. App. 2004) (quoting *United States v. Sharpe*, 470 U.S. 675, 685–86 (1985)).

A search conducted with a person's voluntary consent does not require a warrant. *See Meekins v. State*, 340 S.W.3d 454, 458 (Tex. Crim. App. 2011); *Hutchins v. State*, 475 S.W.3d 496, 498 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). The State bears the burden to prove the voluntariness of consent to search by clear and convincing evidence. *See Meekins*, 340 S.W.3d at 459; *Montanez*, 195 S.W.3d at 108. "A person's consent to search can be communicated to law enforcement in a variety of ways, including by words, action, or circumstantial evidence showing implied consent." *Meekins*, 340 S.W.3d at 458 (citing *Valtierra*, 310 S.W.3d at 451–52).

D. Testimony Presented During the Motion to Suppress

The only witness called to testify during the motion to suppress hearing was San Antonio Police Officer Edward Rodriguez. The officer testified that on July 10, 2014, he responded to a domestic disturbance call alleging the complainant's ex-boyfriend was at her apartment, she was locked inside, and he was beating on the door, kicking the door, and threatening the complainant. When Officer Rodriguez and his partner arrived at the location, the complainant appeared scared and upset. She told officers that her ex-boyfriend left the premise, and she did not "want anything to do with [him]." Shortly thereafter, Alfaro-Jimenez walked up to Officer Rodriguez and told the officer that he "just want[ed] to set the record straight on this." Although Alfaro-Jimenez was relatively calm at the time, based on his aggressive nature with the complainant, the officers placed Alfaro-Jimenez in handcuffs for their safety.

Alfaro-Jimenez identified himself as Juan Alberto Torres Landa. The complainant also told the officers that Alfaro-Jimenez "may not be legal." Officer Rodriguez requested identification and explained that they had reason to believe that he "may not be here legally." Officer Rodriguez testified that Alfaro-Jimenez

> gestured [to] his back pocket. It's in my back pocket, right there, in his wallet. And he gestured, like, leaning over and bending over kind of for me to reach for his wallet. I said, Is that your wallet right there? He said, Yeah, it's right inside there. . . . He was bending over, kind of gesturing like it's right there in my wallet.

Officer Rodriguez removed the wallet and Alfaro-Jimenez said, "My ID—open—open the wallet, my ID is in the pocket right there. Right in there. So he told me where it was, too." Officer Rodriguez continued that, as he was looking for the driver's license, he came across a Mexican driver's license, permanent resident (alien) card, and a Social Security card all bearing the name Juan Alberto Torres Landa. The officer immediately suspected something was wrong.

> When I looked at [the Social Security card], the paper was flimsier than a normal one. The ink on it was not dark—standard dark print. And I looked down

> on the left corner of it and there was like a—like a smear from a water drop or something on it. Like ink smeared on it. So I knew then it was printed up on a printer at home or something like that. So I asked for his Social Security number and he gave me the one on the card. Actually, I don't think he remembered the Social Security number.

Pursuant to protocol, Officer Rodriguez contacted the ICE agent. After running the information through their computer system, the agent reported that the Social Security number was registered to a person from Vietnam. Based on the information received from the ICE agent, Officer Rodriguez asked Alfaro-Jimenez whether he was in the United States illegally. He answered affirmatively and Officer Rodriguez placed him under arrest for tampering with a government document.

Officer Rodriguez testified that, when asked, Alfaro-Jimenez provided his real name. After having him fingerprinted, Officer Rodriguez was able to confirm the individual's actual name was Pablo Alfaro-Jimenez.

On cross-examination, Officer Rodriguez confirmed that when an officer "walk[s] into the unknown" and there is reason to suspect that the person is violent, "he goes into handcuffs immediately for officer safety." He explained the officers could not know if the individual had a gun, knife, or other weapon. The officers also conducted a pat down to check for weapons prior to placing him in handcuffs.

Officer Rodriguez explained the officers ask everyone for identification. "That's how we get warrants, that's how we find wanted people through murder warrants, anything like that. We ID people. Our department requires us to ID people at the scene." Officer Rodriguez conceded that Alfaro-Jimenez was handcuffed when the officer requested identification and that the individual could not have reached his wallet.

Officer Rodriguez, however, was adamant that Alfaro-Jimenez told him the wallet's location and where to find the documents. According to the officer, Alfaro-Jimenez "leaned back

and said, My wallet is right there. My . . . driver's license is there in the wallet." Officer Rodriguez confirmed that he pulled the wallet out of Alfaro-Jimenez's back pocket and Alfaro-Jimenez was not free to leave at that point. The officer further explained that when he pulled out the Mexican driver's license, the Social Security card came out. "And I looked at the spread there to make sure the pictures matched." When he was comparing the pictures, he noticed the smeared ink on the Social Security card. Officer Rodriguez confirmed that he had not yet *Mirandized* Alfaro-Jimenez because he was still attempting to determine his identification.

After reviewing a video-taped recording of the incident, the trial court determined the officers possessed reasonable suspicion to detain Alfaro-Jimenez. The trial court reasoned the officers were "there for either a possible trespass or a burglary, or at least even disturbing the peace, with the testimony that the call that was in; a man trying to kick down the door, screaming and yelling. The police have a right to go out and investigate something like that." When Alfaro-Jimenez approached the officers, the officers were within their rights to determine his identity. The officers simply detained the individual; he was not placed under arrest. The trial court further found that Alfaro-Jimenez "consented for the police officer to take the wallet from his back pocket." The trial court explained,

> [i]t's hard to describe for the record, but he indicated with his head, or he was, in a sense, acting as the defendant at the time of this incident of showing that his hands were in cuffs and his head would turn and, in a sense, his chin would point towards his back pocket for me, indicating that the defendant was giving the officer the consent by showing him where the wallet was located.

While going through the wallet, the officer located what he believed to be a false government record. When the officer attempted to verify the information with the ICE agent, neither the oral identification nor the documents provided by the individual correlated to the name provided by the individual. The individual also hesitated when asked for his birthdate. Each of these incidents led to Officer Rodriguez asking whether Alfaro-Jimenez was legally in the United States. He

confirmed he was in the United States illegally and Officer Rodriguez placed him under arrest. After Alfaro-Jimenez was *Mirandized*, he continued to make spontaneous statements which further incriminated him.

The trial court partially granted Alfaro-Jimenez's motion to suppress. The trial court suppressed any statements made between the arrest and the officer's reading of Alfaro-Jimenez's *Miranda* rights, but explained that "questions and statements made after the *Miranda* statement will not be suppressed." The trial court further denied Alfaro-Jimenez's request to suppress any evidence seized from the wallet. The State agreed to have the video-tape redacted to comply with the trial court's order.

E. Analysis

Our review questions whether, based on the totality of the circumstances, the officer's actions unduly prolonged the detention and whether such actions were a reasonable means of investigation to confirm or dispel the officer's suspicions. *See Kothe*, 152 S.W.3d at 64; *see also Perez v. State*, 818 S.W.2d 512, 517 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("The propriety of the stop's duration is judged by assessing whether the police diligently pursued a means of investigation that was likely to dispel or confirm their suspicions quickly."). In a routine investigative detention, an officer may request certain information, such a driver's license, and may conduct a computer check on that information. *See Kothe*, 152 S.W.3d at 63 (citing *United States v. Brigham*, 382 F.3d 500, 512 (5th Cir. 2004) (en banc)); *see also Davis v. State*, 947 S.W.2d 240, 245 n.6 (Tex. Crim. App. 1997) (concluding it was not unreasonable for officer to temporarily detain individual to check identification and outstanding warrants).

We remain mindful of our deference to the trial court's factual determinations. *See Montanez*, 195 S.W.3d at 106. In the present case, the trial court determined Officer Rodriguez based his suspicion of possible criminal activity on statements made by the complainant—related

to the potential assault and whether Alfaro-Jimenez was legally in the United States. The officer was in a position to determine whether placing Alfaro-Jimenez in handcuffs was necessary for officer safety while he continued to investigate the complainant's allegations. Officer Rodriguez requested identification to both verify the individual's identification and to check for warrants. The trial court further found that Alfaro-Jimenez (1) provided the officer consent to retrieve the wallet from his pocket and (2) instructed the officer where his identification was located in the wallet.

Based on a review of the record, the trial court could reasonably determine that Officer Rodriguez diligently pursued a means to confirm or dispel his suspicions and the detention was not so long as to become constitutionally prohibited. *See id.* The trial court could also reasonably determine, by clear and convincing evidence, that Alfaro-Jimenez provided his consent for Officer Rodriguez to retrieve his wallet and the identification contained within the wallet. *See Meekins*, 340 S.W.3d at 460 (holding trial court's determination of voluntariness "must be accepted on appeal unless it is clearly erroneous"); *Martinez v. State*, 17 S.W.3d 677, 683 (Tex. Crim. App. 2000) (holding that officer's testimony that consent was voluntarily given is sufficient to prove voluntariness). We, therefore, conclude the trial court did not err in denying Alfaro-Jimenez's motion to suppress.

SUFFICIENCY OF THE EVIDENCE—PRESENTMENT OF THE SOCIAL SECURITY CARD

A. Standard of Review

In reviewing the sufficiency of the evidence, "we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011); *accord Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). "This standard recognizes the trier of fact's role as the sole judge of the weight and credibility of

the evidence. . . ." *Adames*, 353 S.W.3d at 860; *accord Gear*, 340 S.W.3d at 746. The reviewing court must also give deference to the jury's ability "'to draw reasonable inferences from basic facts to ultimate facts.'" *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id*. (citing *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993)).

We may not substitute our judgment for that of the jury by reevaluating the weight and credibility of the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). We defer to the jury's responsibility to resolve any conflicts in the evidence fairly, weigh the evidence, and draw reasonable inferences. *See Hooper*, 214 S.W.3d at 13; *King*, 29 S.W.3d at 562. The jury alone decides whether to believe eyewitness testimony, and it resolves any conflicts in the evidence. *See Hooper*, 214 S.W.3d at 15; *Young v. State*, 358 S.W.3d 790, 801 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). In conducting a sufficiency review, "[w]e do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure that the jury reached a rational decision." *Young*, 358 S.W.3d at 801.

B. Arguments of the Parties

Alfaro-Jimenez contends the evidence is insufficient to support the jury's finding that he "presented" the Social Security card to the officer as required by statute. More specifically, Alfaro-Jimenez contends there is no evidence that he used, or attempted to use, the Social Security card in question. Alfaro-Jimenez also contends the evidence is insufficient to support a finding that the card in question was, in fact, a government document.

C. Evidence Presented at Trial

The evidence at trial consisted of the testimony of Officer Rodriguez, Criminal Investigator Damien Reyes, and Alfaro-Jimenez. The jury also received a redacted copy of the dashboard videotape and the Social Security card in question. Because Officer Rodriguez's testimony was similar to the testimony he provided in the motion to suppress, the summary of his trial testimony is limited and includes any distinctions between the two.

1. San Antonio Police Officer Edward Rodriguez

Officer Rodriguez, a thirteen-year veteran of the San Antonio Police Department, testified that he and his partner responded to a 911 call regarding a domestic disturbance. The complainant reported that her ex-boyfriend was "at the location, banging on the door, kicking on the door, screaming, yelling, [and] making threats." The complainant identified her ex-boyfriend as Juan Alberto Torres Landa. Officer Rodriguez further described the complainant as upset, crying, and that she would not exit the apartment until the officers arrived.

Officer Rodriguez explained that when they were speaking to the complainant, the ex-boyfriend, Appellant Alfaro-Jimenez, returned. She saw him and "backed off," as though she was "already afraid of him."

> from past experience in calls, something like this, the guy comes back, you know, expected, unexpected, so we immediately detain him, put him in handcuffs for officer safety. Pa[t] him for any weapons that he may have come back with. We don't know. We're going into the unknown. We have to be prepared for anything. So I put him in handcuffs for officer safety.

Appellant told the officer that he wanted to set the record straight. Officer Rodriguez testified that for officer safety, Appellant was placed in handcuffs, patted down for weapons, and detained to allow the officers to evaluate the situation. He further testified that Appellant kept looking toward the complainant, "trying to make eye contact with her. . . . we [took] that as an intimidating factor."

Pursuant to standard office policy, Officer Rodriguez requested identification. When asked, Appellant identified himself as Juan Alberto Torres Landa. Officer Rodriguez asked for "proper ID" with a picture on it and Appellant told the officer it was in the wallet in his back pocket. He then "kind of reached over, bent over to give me the pocket." Officer Rodriguez clarified that Appellant "motioned for me to go ahead and take it out for him. I took it as, okay, it's right here."

Appellant proceeded to tell the officer his identification was in the wallet and directed the officer in which of the wallet's slots to look. Officer Rodriguez testified that he removed Appellant's identification bearing the name Juan Alberto Torres Landa. Additionally, Appellant pointed to his alien card and Mexican driver's license that both bore the same name. Officer Rodriguez testified that it was the Social Security card that caught his attention. The paper looked flimsy, the edges were tearing off, and on the left-hand corner, "you could see where drops of water or something was on the ink and it started to dry out and blur with a wet mark on there, [ ] Social Security cards don't do that." On cross-examination, Officer Rodriguez conceded that Appellant never said, "my Social Security card is right there, go ahead and look at it," and he never directly "offer[ed] his Social Security [card]" to the officer.

When Officer Rodriguez suspected the Social Security card was potentially fraudulent, he contacted the ICE office and provided the information from the alien card requested by the liaison officer. The agent reported that the number was a "good alien number but it's for someone from Vietnam." The Social Security card was registered to someone else from Vietnam that came to the United States to be a naturalized citizen. At that point, Appellant was placed under arrest for tampering with government documents, *Mirandized*, and placed in the back of the patrol car.

2. Criminal Investigator Damien Reyes

Damien Reyes, a criminal investigator with the Office of the Inspector General in the United States Social Security Administration, was also called as a witness. Reyes confirmed that Social Security cards were issued by the government and that they were considered a government record. Reyes testified that on the day in question, Officer Rodriguez provided him with information regarding an individual who was potentially using a counterfeit Social Security card in his possession during the time of his arrest. Pursuant to the information provided by Officer Rodriguez, Reyes conducted a Social Security information query and determined that the number on the card did not match the name on the card. He further testified that using the card for identification was a misrepresentation. "[Use of the card] would be a misrepresentation of a valid Social Security card. In this case, this card is a counterfeit Social Security card." Reyes further explained that using another's card constitutes defrauding or victimizing the true number holder and could affect that individual in many ways, including tax and/or earning purposes. On cross-examination, Reyes confirmed that Alfaro-Jimenez had not applied for any Social Security benefits with the number on the card. Rodriguez further testified that he did not know if Alfaro-Jimenez used the card anywhere else in addition to presenting the counterfeit card to the officer.

3. Juan Pablo Alfaro-Jimenez

Juan Pablo Alfaro-Jimenez testified that he moved to Arizona in 1999. Ten years later, he married and his daughter was born. He and his wife divorced; his ex-wife moved to Texas and Alfaro-Jimenez ultimately followed to be closer to his daughter.

Alfaro-Jimenez testified that on the day in question, he and the complainant in this case were no longer dating. They had been arguing on the telephone and he went to her apartment so they could work out their disagreement. He testified that he did not "knock on the door" because her children were there. She was talking to him through the window when she told him that she

was calling the police. He asserted the only thing he broke that day was his cell phone when he threw it on the sidewalk.

Alfaro-Jimenez contends that he left her apartment and proceeded to call the complainant from work. When she told him the officers were there, he left work "so [they could] talk in front of the police." But when he arrived, "they didn't let me talk at all at any moment. They handcuffed me. They took away my wallet. One of them threw me on the ground and he broke my glasses. They hurt my arm." Alfaro-Jimenez denied giving the officer permission to retrieve his wallet. He acknowledged telling the officer that his identification was in his wallet, but again denied giving the officer permission to reach into his pocket to retrieve the wallet.

When asked, Alfaro-Jimenez testified that, almost four years prior to the incident in question, he bought the Social Security card for $60.00 so that he could get a job. He claimed the individual from whom he bought the Social Security number made up both the number and the name on the card. He further testified that the only reason he ever used the card was to obtain work; he never used the Social Security card to apply for credit, open a bank account, or apply for Social Security benefits.

On cross-examination, Alfaro-Jimenez acknowledged that he was in possession of the Social Security card, that the name on the card was not his, and that he lied to Officer Rodriguez regarding his identification. Alfaro-Jimenez further conceded that he lied to his employers. He was adamant, however, that he never approached the complainant's door that afternoon and only wanted her to quit sending him messages. Finally, Alfaro-Jimenez acknowledged he told the officer that his identification was in his pocket.

D. Analysis

Alfaro-Jimenez contends he was handcuffed when the officer searched through his wallet. After finding the requested identification, the officer continued to search through Alfaro-Jimenez's

wallet until he located the Social Security card in question. Alfaro-Jimenez argues the record does not support that he used or attempted to use the Social Security card.

The elements for tampering with a governmental record under penal code section 37.10(a)(2) are that (1) a person (2) makes, presents, or uses (3) any record, document, or thing (4) with knowledge of its falsity and (5) with intent that it be taken as a genuine governmental record. *See* TEX. PENAL CODE ANN. § 37.10(a)(2). In *Tottenham v. State*, 285 S.W.3d 19, 27–28 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd), the court explained "an offense is committed if a person 'makes, presents, or uses' a false record."

The testimony is uncontroverted that the Social Security card in question was counterfeit. Alfaro-Jimenez testified that he used the Social Security card to obtain work. *See Vasquez v. State*, No. 01-07-00666-CR, 2008 WL 2209526, at *6 (Tex. App.—Houston [1st Dist.] May 29, 2008, pet. ref'd) (mem. op., not designated for publication) (concluding that using a mechanic's lien foreclosure form to support his application for Texas certificate of title was making, presenting, or using a government record). "A Social Security card is a 'certificate issued by the United States,' and, therefore, it is a 'governmental record' as defined by Texas Penal Code section 37.01(2)(c)." *Lopez v. State*, 25 S.W.3d 926, 929 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

It is solely within the jury's province "to weigh the evidence presented, evaluate the credibility of the witnesses and accept or reject the theories presented to it and we must defer to the jury's credibility and weight determinations." *Tottenham*, 285 S.W.3d at 28–29. Here, based on the circumstantial evidence, the jury could reasonably infer each of the elements of the offense beyond a reasonable doubt. *Id*. ("[B]oth intent and knowledge may be inferred from circumstantial evidence and proof of a culpable mental state almost invariably depends on circumstantial evidence."); *see also Dickey v. State*, No. 01-15-00835-CR, 2017 WL 1149215, at *4 (Tex. App.—

Houston [1st Dist.] Mar. 28, 2017, no pet.) (mem op., not designated for publication) ("Direct evidence of the requisite mental state is not required.").

Additionally, because the State sought to charge Alfaro-Jimenez with the second-degree felony offense of tampering with a governmental record, the State was required to additionally prove that the accused committed the offense "with the intent to defraud or harm another." *See* TEX. PENAL CODE ANN. §§ 37.10(c)(1). The testimony at trial focused on Alfaro-Jimenez's possession and use of the Social Security card as identification. Alfaro-Jimenez testified that he did not obtain any additional benefits or use the card for any purpose other than employment. We, therefore, conclude the jury could have reasonably concluded that during the commission of the offense, Alfaro-Jimenez used or presented the Social Security card, but that he did not intend "to defraud or harm another." *Tottenham*, 285 S.W.3d at 28. Additionally, because the jury concluded Alfaro-Jimenez did not intend to defraud or harm another, we conclude the trial court properly sentenced Alfaro-Jimenez's offense as a Class A misdemeanor. *See* TEX. PENAL CODE ANN. § 37.10(c) (classifying offense as Class A misdemeanor if no intent to defraud or harm another and document was not any of the following: public school records, reports or assessments; written medical, chemical, toxicological, ballistic, or other expert examination reports; certification, inspection, or maintenance records; search warrants, record used for enrollment of student; or written appraisal filed with an appraisal board).

Accordingly, we overrule Alfaro-Jimenez's appellate issues related to the sufficiency of the evidence.

TEXAS PENAL CODE SECTION 37.10

In his final issue on appeal, Alfaro-Jimenez contends that Texas Penal Code section 37.10 is unconstitutionally vague. The State counters that Alfaro-Jimenez forfeited any alleged error by failing to raise the issue before the trial court. We agree with the State.

"A facial challenge to the constitutionality of a statute falls within [rights that can be forfeited]. Statutes are presumed to be constitutional until it is determined otherwise." *See Karene v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (citing *Flores v. State*, 245 S.W.3d 432, 438 (Tex. Crim. App. 2008); *Doe v. State*, 112 S.W.3d 532, 539 (Tex. Crim. App. 2003)). A review of the record does not include, and Alfaro-Jimenez has not pointed to any argument before the trial court that the statute was facially vague or vague as applied to him. We, therefore, conclude that Alfaro-Jimenez waived his right to appeal any alleged facial challenge to the constitutionality of Texas Penal Code section 37.10. *See id*.; *see also Sony v. State*, 307 S.W.3d 348, 353 (Tex. App.—San Antonio 2009, no pet.).

CONCLUSION

Having overruled each of Alfaro-Jimenez's issue on appeal, we affirm the trial court's judgment.

Patricia O. Alvarez, Justice

PUBLISH

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-16-00188-CR

Pablo **ALFARO-JIMENEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR9248
Honorable Jefferson Moore, Judge Presiding

BEFORE CHIEF JUSTICE MARION, JUSTICE BARNARD, AND JUSTICE ALVAREZ

In accordance with this court's opinion of this date, the trial court's judgment is AFFIRMED.

SIGNED August 2, 2017.

Patricia O. Alvarez, Justice

APPENDIX B

COURT OF APPEALS OPINION IN JIMENEZ V. STATE, FROM THE FOURTH COURT OF APPEALS SAN ANTONIO, TEXAS, DATED

November 15, 2017

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-16-00188-CR

Pablo **ALFARO-JIMENEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR9248
Honorable Jefferson Moore, Judge Presiding

OPINION ON MOTION FOR REHEARING

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 15, 2017

AFFIRMED AND REFORMED AND REMANDED

On August 2, 2017, this court issued an opinion in the above styled cause of action affirming the trial court's judgment in its entirety. The State filed a motion for rehearing and, although we requested Appellant Pablo Alfaro-Jimenez file a response to the State's motion, no response has been filed. The State's motion for rehearing is granted. The court's opinion and judgment dated August 2, 2017 are withdrawn and this opinion and judgment are substituted in their stead.

On December 9, 2015, a Bexar County jury returned a guilty verdict against Appellant Alfaro-Jimenez for tampering with a government document. The trial court subsequently sentenced Alfaro-Jimenez to one-year confinement in the Bexar County Jail, suspended and probated for a period of two years, and a $1,500.00 fine. On appeal, Alfaro-Jimenez contends: (1) the evidence is insufficient to support the jury's verdict; (2) the trial court erred denying Alfaro-Jimenez's motion to suppress; and (3) Texas Penal Code section 37.10, the statute under which Alfaro-Jimenez was convicted, is unconstitutionally vague. *See* TEX. PENAL CODE ANN. § 37.10 (West 2016). The State also asserted the trial court improperly characterized the lesser-included offense as a Class A misdemeanor. We affirm the trial court's conviction; however, we reform the judgment to reflect Alfaro-Jimenez's conviction for tampering with a government document was that of a third-degree felony and remand the matter to the trial court for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On July 10, 2014, San Antonio Police Officer Edward Rodriguez was dispatched for a domestic disturbance. The complainant told the officers that her ex-boyfriend, identified as Juan Alberto Torres Landa, was beating on the door, kicking the door, and threatening her. By the time officers arrived, the ex-boyfriend was gone.

After conducting an investigation, and ensuring the complainant's safety, Officer Rodriguez was leaving the premises when the ex-boyfriend approached Officer Rodriguez and requested permission to tell his version of the incident. In light of the violent allegations, the individual was handcuffed for officer safety. While attempting to identify the ex-boyfriend, Officer Rodriguez became suspicious that the ex-boyfriend's identification, specifically the social security card, was fraudulent.

Officer Rodriguez contacted the United States Department of Homeland Security Immigration and Customs Enforcement Department (ICE) and determined the name and information provided did not belong to the ex-boyfriend. The individual subsequently identified himself as Pablo Alfaro-Jimenez and Officer Rodriguez confirmed the identification through a fingerprint comparison. Appellant Alfaro-Jimenez was arrested for tampering with a government document.

A jury returned a guilty verdict against Alfaro-Jimenez and the trial court subsequently assessed punishment at one-year confinement in the Bexar County Jail, suspended and probated for a period of two years, and a $1,500.00 fine. This appeal ensued.

MOTION TO SUPPRESS

Prior to opening statement, and outside the presence of the jury, the trial court heard testimony and arguments pertaining to Alfaro-Jimenez's motion to suppress. Asserting the officers possessed insufficient grounds to arrest Alfaro-Jimenez, and that the search extended beyond reasonable grounds, defense counsel sought to suppress both the evidence and Alfaro-Jimenez's statements.

A. Standard of Review

An appellate court reviews a trial court's ruling on a motion to suppress using a bifurcated standard of review; we "'afford almost total deference to a trial court's determination of the historical facts that the record supports.'" *Montanez v. State*, 195 S.W.3d 101, 106 (Tex. Crim. App. 2006) (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)); *accord Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). A reviewing court must

> give almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. But when application-of-

> law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court's rulings on those questions de novo.

Wilson v. State, 442 S.W.3d 779, 783 (Tex. App.—Fort Worth 2014, pet. ref'd) (citations omitted); *see also Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); *Swearingen v. State*, 143 S.W.3d 808, 811 (Tex. Crim. App. 2004).

B. Arguments of the Parties

Alfaro-Jimenez contends Officer Rodriguez exceeded his authority by prolonging the detention beyond the scope of his investigation and that he conducted an illegal search when he retrieved Alfaro-Jimenez's wallet without his consent.

The State counters that, based on a totality of the circumstances, Officer Rodriguez's actions constituted a reasonable investigative detention and, that during such detention, Alfaro-Jimenez provided Officer Rodriguez consent to procure Alfaro-Jimenez's identification from the wallet located in his back pocket.

C. Interactions between Police Officers and Citizens

"The Fourth Amendment protects individuals against unreasonable searches and seizures." *State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011) (citing U.S. CONST. amend. IV). Importantly, however, the Fourth Amendment is not invoked simply because an officer and a person converse. *See Weaver*, 349 S.W.3d at 525. Our analysis, therefore, begins with a determination of whether Alfaro-Jimenez met his initial burden to produce some evidence that the police conducted a search or seizure without a warrant. *See Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Only after some evidence has been presented does the burden shift to the State to establish that the warrantless search was reasonable. *Id.*

The Texas Court of Criminal Appeals addressed the interactions between officers and private citizens in *State v. Garcia-Cantu*; the court stated that "[e]ach citizen-police encounter

must be factually evaluated on its own terms; there are no per se rules." *State v. Garcia-Cantu*, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008). "[T]here are three distinct types of interactions between police and citizens: (1) consensual encounters, which require no objective justification; (2) investigative detentions, which require reasonable suspicion; and (3) arrests, which require probable cause." *State v. Castleberry*, 332 S.W.3d 460, 466 (Tex. Crim. App. 2011) (footnotes omitted); *accord Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010). "In assessing whether a seizure is an investigative detention or an arrest, we take an objective view of the officer's actions—'judged from the perspective of a reasonable officer at the scene, rather than with the advantage of hindsight.'" *State v. Adams*, 454 S.W.3d 38, 44 (Tex. App.—San Antonio 2014, no pet.) (quoting *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997)). Handcuffing alone does not necessarily transform an investigative detention into an arrest. *See State v. Sheppard*, 271 S.W.3d 281, 283 (Tex. Crim. App. 2008) ("[A] person who has been handcuffed has been 'seized' and detained under the Fourth Amendment, but he has not necessarily been 'arrested.'"); *see also Rhodes*, 945 S.W.2d at 118 (concluding there is no bright-line test providing that mere handcuffing is always equivalent of arrest). "[A]llowances must be made for the fact that officers must often make quick decisions under tense, uncertain and rapidly changing circumstances." *Rhodes*, 945 S.W.2d at 118; *accord Hauer v. State*, 466 S.W.3d 886, 891 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

To establish reasonable suspicion, "an officer must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" *Foster v. State*, 326 S.W.3d 609, 613 (Tex. Crim. App. 2010) (quoting *United States v. Sokolow*, 490 U.S. 1, 21 (1989)). The determination must be based on common-sense judgments and rational inferences about human behavior. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *see also Young v. State*, 133 S.W.3d 839, 841 (Tex. App.—El Paso 2004, no pet.). Police officers may rely on their own experience and

training when making this determination. *Young*, 133 S.W.3d at 841. "The issue is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *Kothe v. State*, 152 S.W.3d 54, 64–65 (Tex. Crim. App. 2004) (quoting *United States v. Sharpe*, 470 U.S. 675, 685–86 (1985)).

A search conducted with a person's voluntary consent does not require a warrant. *See Meekins v. State*, 340 S.W.3d 454, 458 (Tex. Crim. App. 2011); *Hutchins v. State*, 475 S.W.3d 496, 498 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). The State bears the burden to prove the voluntariness of consent to search by clear and convincing evidence. *See Meekins*, 340 S.W.3d at 459; *Montanez*, 195 S.W.3d at 108. "A person's consent to search can be communicated to law enforcement in a variety of ways, including by words, action, or circumstantial evidence showing implied consent." *Meekins*, 340 S.W.3d at 458 (citing *Valtierra*, 310 S.W.3d at 451–52).

D. Testimony Presented During the Motion to Suppress

The only witness called to testify during the motion to suppress hearing was San Antonio Police Officer Edward Rodriguez. The officer testified that on July 10, 2014, he responded to a domestic disturbance call alleging the complainant's ex-boyfriend was at her apartment, she was locked inside, and he was beating on the door, kicking the door, and threatening the complainant. When Officer Rodriguez and his partner arrived at the location, the complainant appeared scared and upset. She told officers that her ex-boyfriend left and she did not "want anything to do with [him]." Officer Rodriguez's partner was speaking to the complainant when Alfaro-Jimenez walked up to Officer Rodriguez and told the officer that he "just want[ed] to set the record straight on this." Although he was relatively calm at the time, based on his aggressive nature with the complainant, the officer placed Alfaro-Jimenez in handcuffs for his safety.

Alfaro-Jimenez identified himself as Juan Alberto Torres Landa. The complainant also told the officers that Alfaro-Jimenez "may not be legal." Officer Rodriguez requested identification and explained that they had reason to believe that he "may not be here legally." Officer Rodriguez testified that Alfaro-Jimenez

> gestured [to] his back pocket. It's in my back pocket, right there, in his wallet. And he gestured, like, leaning over and bending over kind of for me to reach for his wallet. I said, Is that your wallet right there? He said, Yeah, it's right inside there. . . . He was bending over, kind of gesturing like it's right there in my wallet.

Officer Rodriguez removed the wallet and Alfaro-Jimenez said, "My ID—open—open the wallet, my ID is in the pocket right there. Right in there. So he told me where it was, too." Officer Rodriguez continued that, as he was looking for the driver's license, he came across a Mexican driver's license, permanent resident (alien) card, and a social security card all bearing the name Juan Alberto Torres Landa. The officer, however, immediately suspected something was wrong.

> When I looked at it, the paper was flimsier than a normal one. The ink on it was not dark—standard dark print. And I looked down on the left corner of it and there was like a—like a smear from a water drop or something on it. Like ink smeared on it. So I knew then it was printed up on a printer at home or something like that. So I asked for his Social Security number and he gave me the one on the card. Actually, I don't think he remembered the Social Security number.

Pursuant to protocol, Officer Rodriguez contacted the ICE agent. After running the information through their computer system, the agent reported that the social security number was registered to a person from Vietnam. Based on the information received from the ICE agent, Officer Rodriguez asked Alfaro-Jimenez whether he was in the United States illegally. He answered affirmatively and Officer Rodriguez placed him under arrest for tampering with a government document.

Officer Rodriguez testified that, when asked, Alfaro-Jimenez provided his real name. After having him fingerprinted, Officer Rodriguez was able to confirm the individual's actual name was Pablo Alfaro-Jimenez.

On cross-examination, Officer Rodriguez confirmed that when an officer "walk[s] into the unknown" and there is reason to suspect that the person is violent, "[the individual] goes into handcuffs immediately for officer safety." He explained the officers could not know if the individual had a gun, knife, or other weapon. The officers also conducted a pat down to check for weapons prior to placing Alfaro-Jimenez in handcuffs.

Officer Rodriguez explained the officers ask everyone for identification. "That's how we get warrants, that's how we find wanted people through murder warrants, anything like that. We ID people. Our department requires us to ID people at the scene." Officer Rodriguez conceded that Alfaro-Jimenez was handcuffed when the officer requested identification and that the individual could not have reached his wallet.

Officer Rodriguez, however, was adamant that Alfaro-Jimenez told him the wallet's location and where to find the documents. According to the officer, Alfaro-Jimenez "leaned back and said, My wallet is right there. My . . . driver's license is there in the wallet." Officer Rodriguez confirmed that he pulled the wallet out of Alfaro-Jimenez's back pocket, and Alfaro-Jimenez was not free to leave at that point. The officer further explained that, when he pulled out the Mexican driver's license, the social security card came out. "And I looked at the spread there to make sure the pictures matched." When Officer Rodriguez was comparing the pictures, he noticed the smeared ink on the social security card. Officer Rodriguez confirmed that he had not yet *Mirandized* Alfaro-Jimenez because he was still attempting to determine his identification.

After reviewing a video-taped recording of the incident, the trial court determined the officers possessed reasonable suspicion to detain Alfaro-Jimenez. The trial court reasoned the officers were "there for either a possible trespass or a burglary, or at least even disturbing the peace, with the testimony that the call that was in; a man trying to kick down the door, screaming and yelling. The police have a right to go out and investigate something like that." When Alfaro-

Jimenez approached the officers, the officers were within their rights to determine his identity. The officers simply detained the individual; he was not placed under arrest. The trial court further found that Alfaro-Jimenez "consented for the police officer to take the wallet from his back pocket." The trial court explained,

> [i]t's hard to describe for the record, but he indicated with his head, or he was, in a sense, acting as the defendant at the time of this incident of showing that his hands were in cuffs and his head would turn and, in a sense, his chin would point towards his back pocket for me, indicating that the defendant was giving the officer the consent by showing him where the wallet was located.

While going through the wallet, the officer located what he believed to be a false government record. When the officer attempted to verify the information with the ICE agent, neither the oral identification nor the documents provided by the individual correlated to the name provided by the individual. The individual also hesitated when asked for his birthdate. Each of these incidents led to Officer Rodriguez asking whether Alfaro-Jimenez was legally in the United States. He confirmed he was in the United States illegally and Officer Rodriguez placed him under arrest. After Alfaro-Jimenez was *Mirandized*, he continued to make spontaneous statements which further incriminated him.

The trial court partially granted Alfaro-Jimenez's motion to suppress. The trial court suppressed any statements made between the arrest and the officer's reading of Alfaro-Jimenez's *Miranda* rights, but explained that "questions and statements made after the *Miranda* statement will not be suppressed." The trial court further denied Alfaro-Jimenez's request to suppress any evidence seized from the wallet. The State agreed to have the video-tape redacted to comply with the trial court's order.

E. Analysis

Our review questions whether, based on the totality of the circumstances, the officer's actions unduly prolonged the detention and whether such actions were a reasonable means of

investigation to confirm or dispel the officer's suspicions. *See Kothe*, 152 S.W.3d at 64; *see also Perez v. State*, 818 S.W.2d 512, 517 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("The propriety of the stop's duration is judged by assessing whether the police diligently pursued a means of investigation that was likely to dispel or confirm their suspicions quickly."). In a routine investigative detention, an officer may request certain information, such as a driver's license, and may conduct a computer check on that information. *See Kothe*, 152 S.W.3d at 63 (citing *United States v. Brigham*, 382 F.3d 500, 512 (5th Cir. 2004) (en banc)); *see also Davis v. State*, 947 S.W.2d 240, 245 n.6 (Tex. Crim. App. 1997) (concluding it was not unreasonable for officer to temporarily detain individual to check identification and outstanding warrants).

We remain mindful of our deference to the trial court's factual determinations. *See Montanez*, 195 S.W.3d at 106. In the present case, the trial court determined Officer Rodriguez based his suspicion of possible criminal activity on statements made by the complainant—related to the potential assault and whether Alfaro-Jimenez was legally in the United States. The officer was in a position to determine whether placing Alfaro-Jimenez in handcuffs was necessary for officer safety while he continued to investigate the complainant's allegations. Officer Rodriguez requested identification to both verify the individual's identification and to check for warrants. The trial court further found that Alfaro-Jimenez (1) provided the officer consent to retrieve the wallet from his pocket and (2) instructed the officer where his identification was located in the wallet.

Based on a review of the record, the trial court could reasonably determine that Officer Rodriguez diligently pursued a means to confirm or dispel his suspicions and the detention was not so long as to become constitutionally prohibited. *See id*. The trial court could also reasonably determine, by clear and convincing evidence, that Alfaro-Jimenez provided his consent for Officer Rodriguez to retrieve his wallet and the identification contained within the wallet. *See Meekins*,

340 S.W.3d at 460 (holding trial court's determination of voluntariness "must be accepted on appeal unless it is clearly erroneous"); *Martinez v. State*, 17 S.W.3d 677, 683 (Tex. Crim. App. 2000) (holding that officer's testimony that consent was voluntarily given is sufficient to prove voluntariness). We, therefore, conclude the trial court did not err in denying Alfaro-Jimenez's motion to suppress.

SUFFICIENCY OF THE EVIDENCE—PRESENTMENT OF THE SOCIAL SECURITY CARD

A. Standard of Review

In reviewing the sufficiency of the evidence, "we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011); *accord Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). "This standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence. . . ." *Adames*, 353 S.W.3d at 860; *accord Gear*, 340 S.W.3d at 746. The reviewing court must also give deference to the jury's ability "'to draw reasonable inferences from basic facts to ultimate facts.'" *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id*. (citing *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993)).

We may not substitute our judgment for that of the jury by reevaluating the weight and credibility of the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). We defer to the jury's responsibility to resolve any conflicts in the evidence fairly, weigh the evidence, and draw reasonable inferences. *See Hooper*, 214 S.W.3d at 13; *King*, 29 S.W.3d at 562. The jury alone decides whether to believe eyewitness testimony, and it resolves any conflicts in the

evidence. *See Hooper*, 214 S.W.3d at 15; *Young v. State*, 358 S.W.3d 790, 801 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). In conducting a sufficiency review, "[w]e do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure that the jury reached a rational decision." *Young*, 358 S.W.3d at 801.

B. Arguments of the Parties

Alfaro-Jimenez contends the evidence is insufficient to support the jury's finding that he "presented" the social security card to the officer as required by statute. More specifically, Alfaro-Jimenez contends there is no evidence that he used, or attempted to use, the social security card in question. Alfaro-Jimenez also contends the evidence is insufficient to support a finding that the card in question was, in fact, a government document.

C. Evidence Presented at Trial

The evidence at trial consisted of the testimony of Officer Rodriguez, Criminal Investigator Damien Reyes, and Alfaro-Jimenez. The jury also received a redacted copy of the dashboard videotape and the social security card in question. Because Officer Rodriguez's testimony was similar to the testimony he provided in the motion to suppress, the summary of his trial testimony is limited and includes any distinctions between the two.

1. San Antonio Police Officer Edward Rodriguez

Officer Rodriguez, a thirteen-year veteran of the San Antonio Police Department, testified that he and his partner responded to a 911 call regarding a domestic disturbance. The complainant reported that her ex-boyfriend was "at the location, banging on the door, kicking on the door, screaming, yelling, [and] making threats." The complainant identified her ex-boyfriend as Juan Alberto Torres Landa. Officer Rodriguez further described the complainant as upset, crying, and that she would not exit the apartment until the officers arrived.

Officer Rodriguez explained that when they were speaking to the complainant, the ex-boyfriend, Alfaro-Jimenez, returned. She saw him and "backed off," as though she was "already afraid of him."

> from past experience in calls, something like this, the guy comes back, you know, expected, unexpected, so we immediately detain him, put him in handcuffs for officer safety. Pa[t] him for any weapons that he may have come back with. We don't know. We're going into the unknown. We have to be prepared for anything. So I put him in handcuffs for officer safety.

Alfaro-Jimenez told the officer that he wanted to set the record straight. Officer Rodriguez testified that for officer safety, Alfaro-Jimenez was placed in handcuffs, patted down for weapons, and detained to allow the officers to evaluate the situation. He further testified that Alfaro-Jimenez kept looking toward the complainant, "trying to make eye contact with her. . . . we [took] that as an intimidating factor."

Pursuant to standard office policy, Officer Rodriguez requested identification. When asked, Alfaro-Jimenez identified himself as Juan Alberto Torres Landa. Officer Rodriguez asked for "proper ID" with a picture on it and Alfaro-Jimenez told the officer it was in the wallet in his back pocket. He then "kind of reached over, bent over to give me the pocket." Officer Rodriguez clarified that Alfaro-Jimenez "motioned for me to go ahead and take it out for him. I took it as, okay, it's right here."

Alfaro-Jimenez proceeded to tell the officer his identification was in the wallet and showed him in which of the wallet's slots to look. Officer Rodriguez testified that he removed Alfaro-Jimenez's identification bearing the name Juan Alberto Torres Landa. Additionally, Alfaro-Jimenez pointed to his alien card and Mexican driver's license that both bore the same name. Officer Rodriguez testified that it was the social security card that caught his attention. The paper looked flimsy, the edges were tearing off, and on the left-hand corner, "you could see where drops of water or something was on the ink and it started to dry out and blur with a wet mark on there,

[ ] Social Security cards don't do that." On cross-examination, Officer Rodriguez conceded that Alfaro-Jimenez never said, "my Social Security card is right there, go ahead and look at it," and he never directly "offer[ed] his Social Security [card]" to the officer.

When Officer Rodriguez suspected the social security card was potentially fraudulent, he contacted the ICE office and provided the information from the alien card requested by the liaison officer. The agent reported that the number was a "good alien number but it's for someone from Vietnam." The social security card was registered to someone else from Vietnam that came to the United States to be a naturalized citizen. At that point, Alfaro-Jimenez was placed under arrest for tampering with government documents, *Mirandized*, and placed in the back of the patrol car.

2. Criminal Investigator Damien Reyes

Damien Reyes, a criminal investigator with the Office of the Inspector General in the United States Social Security Administration, was also called as a witness. Reyes confirmed that social security cards were issued by the government and that they were considered a government record. Reyes testified that on the day in question, Officer Rodriguez provided him with information regarding an individual who was potentially using a counterfeit social security card in his possession during the time of his arrest. Pursuant to the information provided by Officer Rodriguez, Reyes conducted a social security information query and determined that the number on the card did not match the name on the card. He further testified that using the card for identification was a misrepresentation. "[Use of the card] would be a misrepresentation of a valid Social Security card. In this case, this card is a counterfeit Social Security card." Reyes further explained that using another's card constitutes defrauding or victimizing the true number holder and could affect that individual in many ways, including tax and/or earning purposes. On cross-examination, Reyes confirmed that Alfaro-Jimenez had not applied for any social security benefits

with the number on the card. Rodriguez further testified that he did not know if Alfaro-Jimenez used the card anywhere else in addition to presenting the counterfeit card to the officer.

3. Juan Pablo Alfaro-Jimenez

Juan Pablo Alfaro-Jimenez testified that he moved to Arizona in 1999. Ten years later, he married and his daughter was born. He and his wife divorced; his ex-wife moved to Texas and Alfaro-Jimenez ultimately followed to be closer to his daughter.

Alfaro-Jimenez testified that on the day in question, he and the complainant were no longer dating. They had been arguing on the telephone and he went to her apartment so they could work out their disagreement. He testified that he did not "knock on the door" because her children were there. She was talking to him through the window when she told him that she was calling the police. He asserted the only thing he broke that day was his cell phone when he threw it on the sidewalk.

Alfaro-Jimenez contends that he left her apartment and proceeded to call the complainant from work. When she told him the officers were there, he left work "so [they could] talk in front of the police." But when he arrived, "they didn't let me talk at all at any moment. They handcuffed me. They took away my wallet. One of them threw me on the ground and he broke my glasses. They hurt my arm." Alfaro-Jimenez denied giving the officer permission to retrieve his wallet. He acknowledged telling the officer that his identification was in his wallet, but again denied giving the officer permission to reach into his pocket to retrieve the wallet.

When asked, Alfaro-Jimenez testified that, almost four years prior to the incident in question, he bought the social security card for $60.00 so that he could get a job. He claimed the individual from whom he bought the social security number made up both the number and the name on the card. He further testified that the only reason he ever used the card was to obtain

work; he never used the social security card to apply for credit, open a bank account, or apply for social security benefits.

On cross-examination, Alfaro-Jimenez acknowledged that he was in possession of the social security card, that the name on the card was not his, and that he lied to Officer Rodriguez regarding his identification. Alfaro-Jimenez further conceded that he lied to his employers. He was adamant, however, that he never approached the complainant's door that afternoon and only wanted her to quit sending him messages. Finally, Alfaro-Jimenez acknowledged he told the officer that his identification was in his pocket.

D. Analysis

Alfaro-Jimenez contends he was handcuffed when the officer searched through his wallet. After finding the requested identification, the officer continued to search through Alfaro-Jimenez's wallet until he located the social security card in question. Alfaro-Jimenez argues the record does not support that he used or attempted to use the social security card.

The elements for tampering with a governmental record under penal code section 37.10(a)(2) are that (1) a person (2) makes, presents, or uses (3) any record, document, or thing (4) with knowledge of its falsity and (5) with intent that it be taken as a genuine governmental record. *See* TEX. PENAL CODE ANN. § 37.10(a)(2). In *Tottenham v. State*, 285 S.W.3d 19, 27–28 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd), the court explained "an offense is committed if a person 'makes, presents, or uses' a false record."

The testimony is uncontroverted that the social security card in question was counterfeit. Alfaro-Jimenez testified that he used the social security card to obtain work. *See Vasquez v. State*, No. 01-07-00666-CR, 2008 WL 2209526, at *6 (Tex. App.—Houston [1st Dist.] May 29, 2008, pet. ref'd) (mem. op., not designated for publication) (concluding that using a mechanic's lien foreclosure form to support his application for Texas certificate of title was making, presenting, or

using a government record). "A social security card is a 'certificate issued by the United States,' and, therefore, it is a 'governmental record' as defined by Texas Penal Code section 37.01(2)(c)." *Lopez v. State*, 25 S.W.3d 926, 929 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

It is solely within the jury's province "to weigh the evidence presented, evaluate the credibility of the witnesses and accept or reject the theories presented to it and we must defer to the jury's credibility and weight determinations." *Tottenham*, 285 S.W.3d at 28–29. Here, based on the circumstantial evidence, the jury could reasonably infer each of the elements of the offense beyond a reasonable doubt. *Id*. ("[B]oth intent and knowledge may be inferred from circumstantial evidence and proof of a culpable mental state almost invariably depends on circumstantial evidence."); *see also Dickey v. State*, No. 01-15-00835-CR, 2017 WL 1149215, at *4 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, no pet.) (mem op., not designated for publication) ("Direct evidence of the requisite mental state is not required.").

Additionally, because the State sought to charge Alfaro-Jimenez with the second-degree felony offense of tampering with a governmental record, the State was required to additionally prove that the accused committed the offense "with the intent to defraud or harm another." *See* TEX. PENAL CODE ANN. §§ 37.10(c)(1). The testimony at trial focused on Alfaro-Jimenez's possession and use of the social security card as identification. Alfaro-Jimenez testified that he did not obtain any additional benefits or use the card for any purpose other than employment. We, therefore, conclude the jury could have reasonably concluded that during the commission of the offense, Alfaro-Jimenez used or presented the social security card, but that he did not intend "to defraud or harm another." *Tottenham*, 285 S.W.3d at 28. However, because the testimony clearly supported the social security card was a certificate, *see Lopez*, 25 S.W.3d at 929, we conclude the trial court erred in sentencing Alfaro-Jimenez's offense as a Class A misdemeanor, *see* TEX. PENAL CODE ANN. § 37.10(c)(2)(A) (providing the offense is a *third-degree felony* if the government

record is ". . . a license, *certificate*, permit, seal, title, letter of patent, *or similar document issued by government*, by another state, or by the United States, *unless the actor's intent is to defraud or harm another*, in which event the offense is *a felony of the second degree*[.]") (emphasis added).[1]

Accordingly, we overrule Alfaro-Jimenez's appellate issues related to the sufficiency of the evidence. We affirm the trial court's conviction and reform the judgment to reflect that Alfaro-Jimenez's conviction for tampering with a government record is that of a third-degree felony. This matter is remanded to the trial court for further proceedings consistent with this opinion.

TEXAS PENAL CODE SECTION 37.10

In his final issue on appeal, Alfaro-Jimenez contends that Texas Penal Code section 37.10 is unconstitutionally vague. The State counters that Alfaro-Jimenez forfeited any alleged error by failing to raise the issue before the trial court. We agree with the State.

"A facial challenge to the constitutionality of a statute falls within [rights that can be forfeited]. Statutes are presumed to be constitutional until it is determined otherwise." *See Karene v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (citing *Flores v. State*, 245 S.W.3d 432, 438 (Tex. Crim. App. 2008); *Doe v. State*, 112 S.W.3d 532, 539 (Tex. Crim. App. 2003)). A review of the record does not include, and Alfaro-Jimenez has not pointed to any argument before the trial court that the statute was facially vague or vague as applied to him. We, therefore, conclude that Alfaro-Jimenez waived his right to appeal any alleged facial challenge to the constitutionality of Texas Penal Code section 37.10. *See id*.; *see also Sony v. State*, 307 S.W.3d 348, 353 (Tex. App.—San Antonio 2009, no pet.).

[1] An appellate court maintains jurisdiction over a criminal conviction to correct an illegal sentence. *See Mizell v. State*, 119 S.W.3d 804, 805 (Tex. Crim. App. 2003). Therefore, the State was not obligated to file a notice of appeal for this court to address the trial court's illegal sentence. *Id.*

CONCLUSION

Having overruled each of Alfaro-Jimenez's issues on appeal, we affirm the trial court's judgment finding Alfaro-Jimenez guilty of tampering with a government document. However, because the Alfaro-Jimenez's conviction for tampering with a government record is that of a third-degree felony, we reform the judgment to reflect the conviction for tampering with a government document is a third-degree felony, and remand the matter to the trial court for further proceedings consistent with this opinion.

Patricia O. Alvarez, Justice

PUBLISH

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-16-00188-CR

Pablo **ALFARO-JIMENEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR9248
Honorable Jefferson Moore, Judge Presiding

BEFORE CHIEF JUSTICE MARION, JUSTICE BARNARD, AND JUSTICE ALVAREZ

In accordance with this court's opinion of this date, the trial court's judgment finding Alfaro-Jimenez guilty of tampering with a government document is AFFIRMED, the judgment is REFORMED to reflect the conviction for tampering with a government document is a third-degree felony, and the matter is REMANDED to the trial court for further proceedings consistent with this opinion.

SIGNED November 15, 2017.

Patricia O. Alvarez, Justice